Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

TISBURY TOWING & TRANSPORTATION CO., INC.,
f/k/a PACKER MARINE, INC.,
Petitioner,

v.

TUG VENUS and TUCKER-ROY
MARINE TOWING & SALVAGE, INC.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

David J. Farrell, Jr.
Counsel of Record
Connors & Farrell
Routes 28 & 137
S. Chatham, MA 02659
(508) 432-2121

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTION PRESENTED FOR REVIEW

In what the First Circuit Court of Appeals called a "factually close case" where Petitioner "proffered considerable" and "strong" circumstantial evidence for the date of a stipulated marine casualty, but lacked direct evidence only because Respondent vessel's log omitted the marine casualty and Respondent failed to report the marine casualty to the United States Coast Guard as required by 46 C.F.R. § 4.05-1, should the burden of producing missing date evidence shift to Respondent?

PARTIES TO THE PROCEEDINGS

Petitioner

Tisbury Towing & Transportation Co., Inc. f/k/a Packer Marine, Inc. is owned by Mr. and Mrs. Ralph M. Packer, Jr. and R. M. Packer Co., which is solely owned by Mr. and Mrs. Ralph M. Packer, Jr. Accordingly, there is no parent or publicly held company owning 10% or more of Petitioner's stock. Sup. Ct. R. 29.6.

Respondents

Tug VENUS, O. N. 203547, in rem, and Tucker-Roy Marine Towing & Salvage, Inc., in personam.

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PETITION FOR WRIT OF CERTIORARI

Tisbury Towing & Transportation Co., Inc. respectfully petitions that a writ of certiorari issue to review the June 5, 2001 judgment and opinion of the United States Court of Appeals for the First Circuit in order to decide an important federal maritime safety question that has not been, but should be, decided by this Court.

OPINIONS BELOW

The First Circuit opinion on the merits is reported in Tisbury Towing & Transportation Co. v. Tug VENUS and Tucker-Roy Marine Towing & Salvage, Inc., 251 F.3d 298 (1st Cir. 2001), which is reproduced in App. A, 1a-8a.

The District of Massachusetts Findings of Fact and Rulings of Law after a Non-Jury Trial are unpublished and reproduced in App. B, 9a-20a.

The demonstrative exhibit used by undersigned counsel at oral argument in the First Circuit and its related unpublished order are reproduced in App. C, 21a-22a and the foldout.

SUPREME COURT JURISDICTION

On June 5, 2001 the First Circuit issued its opinion on the merits and entered judgment. This petition was timely filed prior to the expiration of 90 days. Sup. Ct. R. 13.1.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL REGULATIONS INVOLVED

An essential United States Coast Guard regulation concerning its investigation of marine casualties depends on self-reporting by the vessel involved:

> The owner, agent, master or person in charge of a vessel involved in a marine casualty **shall give notice as soon as possible** to the nearest Coast Guard Marine Safety or Marine Inspection Office whenever the casualty involves any of the following:
>
> (a) **All accidental groundings** and any intentional grounding which also meets any of the other reporting criteria or creates a hazard to navigation, the environment, or the safety of the vessel;
>
> (b) Loss of main propulsion or primary steering...;
>
> (c) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service...;
>
> (d) Loss of life;
>
> (e) Injury which requires professional medical treatment beyond first aid...;
>
> (f) An occurrence not meeting any of the above criteria but resulting in damage to property in excess of $25,000....

46 C.F.R. § 4.05-1 (1988) (emphasis added).

The Coast Guard also requires a written report of a marine casualty:

> In addition to the notice required by § 4.05-1, the marine employer shall, within five days, report in writing to the Officer in Charge, Marine Inspection, at the port in which the casualty occurred or the nearest port of first arrival. The written report required for vessel or personnel accidents shall be made on Form CG-2692. The Form CG-2692A (Barge Addendum) may be used as needed and appended to Form CG-2692.

Id., § 4.05-10(a) (1987). See App. D for the current text of related regulations; see also Diesel Tanker Ira S. Bushey, Inc. v. Tug Bruce A. McAllister, 1995 A.M.C. 806, 829-30 (S.D.N.Y. 1994)(discusses investigation procedures after CG-2692 filing); Taylor v. Bouchard Transportation Co., 1991 A.M.C. 2423, 2425, 2427 (S.D.N.Y. 1991)(any Coast Guard delay in investigation due to late CG-2692 filing); see generally William R. Dorsey, III, Marine Casualty Investigations by the United States Coast Guard and the National Transportation Safety Board, 75 Tul. L. Rev. 1387 (2001).

STATEMENT OF THE CASE

This case involves a maritime hit and run followed by a game of hide and seek. The First Circuit wrongly held that Petitioner was unable to sustain its burden of proof as to the date of damage when Respondent made that impossible by failing to report a stipulated marine casualty to the Coast

Guard as required by 46 C.F.R. § 4.05-1 (1988). See 251 F.3d at 300-01; App. A at 6a, 8a.

A. Original Jurisdiction

Petitioner asserts a 46 U.S.C. § 31301(5)(B) maritime tort lien and a breach of contract claim for grounding damage sustained by its Barge ALGOL 500 and sued Respondent Tug VENUS in rem, causing its arrest pursuant to Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. Petitioner concurrently sued the tug's owner, Respondent Tucker-Roy Marine Towing & Salvage, Inc. in personam.

Accordingly, original admiralty jurisdiction in United States District Court for the District of Massachusetts derived from 28 U.S.C. § 1333(1).

B. Facts

Petitioner[1] alleges its dumb, unmanned Barge ALGOL 500[2] was damaged when Respondent Tug VENUS grounded on the evening of June 15, 1994. The essential facts, as stated by the First Circuit, are as follows:

---

[1] The First Circuit opinion refers to Petitioner as Packer, "the name under which it was doing business at the time of the events at issue." 251 F.3d at 299 n.1; App. A at 2a n.1.

[2] "Non self-propelled barges are commonly referred to as dumb barges. Unlike the barges used on the waterways in Europe, most barges in use on American waterways are dumb barges. The great majority are also unmanned." Philip N. Davey, The Tug and Tow Relationship in the United States, 70 Tul. L. Rev. 475 at 478 n.17 (1995); App. B at 9a n.1.

> Packer discovered damage to the ALGOL 500 in March 1995. and after some investigation it came to suspect Tucker-Roy. This suit followed. Before trial, Tucker-Roy admitted, via stipulation, that the VENUS ran aground at Woods Hole, Massachusetts, while pushing one of Packer's barges on some evening between June 1 and 20, 1994; but Tucker-Roy denied that the barge involved was damaged, and it professed agnosticism as to whether the barge involved was the ALGOL 500, as opposed to one of Packer's other two deck barges. At trial, Packer proffered considerable circumstantial evidence that the grounding occurred specifically on the evening of June 15. That date is significant, because only the ALGOL 500 was available for towing on the evening of June 15; Packer's other two barges were moored in New Bedford harbor at the time. In short, a conclusion that the date of the grounding was June 15 would imply that the VENUS ran aground while hauling the ALGOL 500.

251 F.3d at 299; App. A at 2a-3a (footnote omitted); see also App. C foldout (time line).

The District of Massachusetts trial judge had concluded as "a virtual certainty that this did not happen on June 15, 1994" and entered judgment for Respondent. App. B at 20a.

On appeal, the First Circuit was less skeptical, and in contrast, considered this a "factually close case," 251 F.3d at 299; App. A at 2a, acknowledging that Petitioner's

"circumstantial evidence of the date of the grounding is strong" although not "so impervious to doubt as to render the trial court's judgment clearly erroneous." Id. at 300; App. A at 5a.

The First Circuit then went on to frame the legal question presented by this petition:

> Packer also argues that the district court committed legal error by not shifting to the defense the burden of production or proof as to the date of the grounding incident. Given that Tucker-Roy did not make any record of the incident in the VENUS log, nor report the incident to the Coast Guard as required under Coast Guard regulations, see 46 C.F.R. § 4.05-1, Packer argues that it is Tucker-Roy's fault that there is no direct evidence of the date of the grounding. Accordingly, Packer contends, the defendants should bear the burden of producing evidence of when the incident occurred; Tucker Roy should not be allowed to benefit from its own lack of documentary diligence.

251 F.3d at 300; App. A at 6a.

Although aground for approximately six hours, App. B at 12a,18a n.10, on ledge, 251 F.3d at 299; App. A at 3a, Respondent failed to generate the two most fundamental, threshold records documenting any marine casualty.

First, Respondent neither reported the grounding to the Coast Guard "as soon as possible," as required by 46 C.F.R. § 4.05-1(a) (1988), nor "within five days" by written

Form CG-2692 and appended Form CG-2692A (Barge Addendum), as required by 46 C.F.R. § 4.05-10(a) (1987).

Second, Respondent not only did not record the grounding in the VENUS log, 251 F.3d at 300, App. A at 6a, it also omitted all entries for June 15 despite towing Petitioner's other two barges that day. Even the trial judge considered the June 15 entries as "perhaps deliberately" omitted. App. B at 13a n.3 and associated text. In any event, if rough log sheets existed they should have been retained by Respondent, 46 C.F.R.§ 4.05-15 (1974); App. D at 27a, but were never produced in discovery.

In short, Respondent has no contemporaneous documents evidencing the grounding date and name of the barge involved. Because Petitioner had no personnel aboard the VENUS/barge flotilla, Petitioner's burden of proof was handcuffed when threshold, direct evidence of the grounding date was withheld by Respondent, who now professes "agnosticism as to whether the barge involved was the ALGOL 500, as opposed to one of Packer's other two deck barges." See 251 F.3d at 299; App. A at 2a.

Respondent has never been able to point to another grounding date in the narrow June 1 to 20 stipulated time frame. Respondent's position in this litigation has consistently been that it is absolved because it failed to generate incriminating documentation as required by the Code of Federal Regulations.

REASONS TO ALLOW THE WRIT

This writ should be allowed because the First Circuit Court of Appeals has decided an important question of federal

law that has not been, but should be, settled by this Court. Sup. Ct. R. 10(c).

A. An Important Federal Maritime Safety Question Is Presented That Has Not Been, But Should Be, Decided By This Court

The First Circuit affirmed the trial court because there is no "case standing for the proposition that a defendant's failure to report an accident has any effect on the allocation of burdens." 251 F.3d at 300; App. A at 6a.

Petitioner respectfully submits that this should be that case – or else maritime safety will be imperiled by First Circuit case law encouraging the non-reporting of marine casualties. A dangerous precedent will deter safe operations overall and will cause more severe marine casualties which could be avoided if timely reported.

1. The First Circuit's Opinion is Erroneous

a. Legally, the burden of producing evidence on the date of the grounding should shift to Respondent

Contrary to the First Circuit's suggestion, Petitioner does not suggest that the pivotal question here is "whether Tucker-Roy's negligence in running aground while towing the ALGOL 500 should be presumed to have caused its damage." See 251 F.3d 301; App. A at 7a. Shifting the burden of proof on fault is not before the Court.

Rather, to the extent that Petitioner's circumstantial case may have fallen short, this case is about the burden of production of threshold grounding date evidence withheld by Respondent. Thus, Petitioner fully agrees with the First Circuit that "the pivotal question is whether, when the grounding occurred, Tucker-Roy was towing the ALGOL 500 in the first place." Id. However, Petitioner disagrees with the First Circuit's efforts to distinguish Sternberg Dredging Co. v. Moran Towing & Transportation Co., 196 F.2d 1002 (L. Hand, J.), reh'g denied per curiam, 200 F.2d 603 (2d Cir. 1952), by reading it too narrowly, see 251 F.3d at 300-01; App. A at 6a-7a, and Stevens v. The White City, 285 U.S. 195 (1932), by reading it too broadly, see 251 F.3d at 301; App. A at 7a. Thereby, the First Circuit demonstrated a lack of practical understanding of accidents at sea when threshold evidence in the exclusive control of one party is withheld from interested parties ashore.

i. Sternberg Dredging is not overstated

Sternberg Dredging distinguished the burden of producing evidence from the burden of proof and regarding the former noted

> It is often a controlling factor in deciding where to throw the burden of producing evidence -- and obviously it ought to be --that the proper party to charge is he who alone could discover the truth.

196 F.2d at 1006; quoted below in 251 F.3d at 301; App. A at 6a-7a (except for ellipsed "-- and obviously it ought to be -- "). Judge Hand then cited three non-maritime cases for that obvious proposition. 196 F.2d at 1006 n.5.

First, Selma, Rome & Dalton RR. v. United States, 139 U.S. 560 (1891), assumed the burden of proof was on defendant United States, but regarding books of account that plaintiff did not produce, the Court

> required the plaintiff to disclose such facts as were peculiarly within its knowledge, and thereby make some showing that its claim had not been paid; a fact negative in form, but capable of proof affirmative in its nature by the party who knew, or could easily ascertain, the truth of the case. While the general rule is that the burden of proof is where the pleadings place it, namely, upon the party against whom judgment must go, if no evidence whatever is introduced, its application is often affected by circumstances.

Id. at 567. Here, Petitioner's lack of direct evidence on the grounding date was "affected by circumstances" attributable to Respondent's omission from the VENUS log and required Forms CG-2692 and CG-2692A of "facts as were peculiarly within its knowledge" such that the burden of production on this threshold issue should have been shifted to Respondent "who knew, or could easily ascertain, the truth of the case."

Second, Cliett v. Scott, 102 F.2d 725 (5th Cir. 1939), burdened the defendant, a surviving partner, "to make an accounting" since "partnership assets and accounts were peculiarly within her knowledge." An at sea grounding with Petitioner ashore should similarly burden Respondent with "accounting" for the grounding date.

Third, Fleming v. Harrison, 162 F.2d 789 (8th Cir. 1947), dealt with lumber pricing regulations and addressed

> matters peculiarly within the knowledge of the defendants. If the claim of the plaintiff was based upon an erroneous assumption, due to the existence of some contingency or exception which ... deprived the plaintiff of the right to maintain his action, the defendants could readily have shown that to be the case and put an end to this litigation.
>
> ...."From the very nature of the question in dispute,...all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or be easily attainable by, one of the contending parties, who accordingly could at once put an end to litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

Id. at 792. Here, if Petitioner's June 15 grounding date is "based upon an erroneous assumption," Respondent "could readily have shown that to be the case and put an end to this litigation" by producing evidence of an alternate date for the

grounding, which "lies more peculiarly within [its] knowledge" and "of which" Respondent was "supposed to" make the Coast Guard "cognizant."

Based on these three citations[3], and on the VENUS log omissions and Respondent's failure to report the grounding as required to the Coast Guard and file CG-2692 and CG-2692A Forms, the First Circuit was wrong to read Sternberg Dredging as "clearly an overstatement" on the burden of producing grounding date evidence. See 251 F.3d 301; App. A at 7a.

It was *stipulated* that Respondents were towing one of Petitioner's three barges when the grounding happened during a narrow twenty day time frame. Petitioner's attempts to discover the omitted date of that grounding (let alone the name of its involved barge), can hardly be considered a fishing expedition as that is essential information Respondent was required to report to the Coast Guard. The First Circuit was therefore wrong to conclude that Petitioner's resulting circumstantial case came up short to the extent it remained an open question "whether, when the grounding occurred,

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[3] See also, e.g., United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 256 n.5 (1957)("The ordinary rule based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); US West Communications, Inc. v. Minnesota Public Utilities Commission, 55 F. Supp.2d 968, 987 (D. Minn. 1999)("Generally, under federal and Minnesota common law, the proponent of an issue -- that is the one who wants to prove the affirmative -- has the burden of proof as to that issue.... However, under both federal and Minnesota common law, questions of fairness, such as the control of information, can alter the disposition of the burden of proof.").

Tucker-Roy was towing the ALGOL 500 in the first place." See 251 F.3d 301; App. A at 7a.

Because the issue here is the burden of producing missing evidence, as distinct from the burden of proof on fault, the First Circuit was also wrong to compare Petitioner's case with cases where "the issue was whether, given that the defendant was towing the barge when it was damaged, fault should be presumed." Id. As Judge Hand noted, Respondent "alone could discover the truth" about the omitted date of the grounding and "obviously" it should be burdened with producing threshold evidence on that issue. See Sternberg Dredging, 196 F.2d at 1006.

ii. The White City is not controlling because Petitioner was inconvenienced by knowledge Respondent peculiarly concealed

The First Circuit's reliance on Stevens v. The White City is inapposite here. The "inconvenience" faced there by Stevens was a lack of knowledge, both by him and The White City personnel, on what happened to the towed Drifter. Perhaps it was hit by a piece of driftwood when no one was looking. 285 U.S. at 199-200.

Stevens v. The White City is not controlling here because everyone now knows where VENUS grounded. Rather, Petitioner's "inconvenience" in proving the barge involved was the ALGOL 500 is solely due to absent VENUS log entries and absent Coast Guard reports which if generated as required would constitute direct evidence of the grounding date. Instead, this basic, threshold fact "peculiarly within the knowledge of the respondents," id . at 202, was peculiarly concealed by Respondent from the Coast Guard, from

Petitioner, and from the courts below. As the First Circuit noted, Petitioner contends Respondent "should not be allowed to benefit from its own lack of documentary diligence." 251 F.3d at 301; App. A at 6a.

Despite Respondent's lack of "documentary diligence" -- or worse -- Petitioner was able to put on a "strong" circumstantial case, 251 F.3d at 300; App. A at 5a, and did its best to take "the time, place, and cause" of ALGOL 500's damage out of "the realm of conjecture." Stevens v. The White City, 285 U.S. at 203-04; Elizabeth Turner, Inc. v. Tug Lucky D, 941 F. Supp. 439, 443 (S.D.N.Y. 1996). To the extent that the courts below concluded Petitioner did not accomplish that, it is solely because Respondent was able to conceal the date of the grounding by not recording it and reporting it to the Coast Guard as required. That also constitutes a breach of what Stevens v. The White City defines as the tower's "duty to exercise such reasonable care and maritime skill as prudent navigators employ...." 285 U.S. at 202.

The burden of production should shift on these facts or the First Circuit opinion will establish a dangerous precedent discouraging the reporting of marine casualties. Vessels will be encouraged to evade responsibility since the opinion rewards those who fail to log and report marine casualties. Cf. Joel K. Goldstein, The Future of Maritime Law in the Federal Courts: Faculty Colloquium: Towage, 31 J. Mar. L. & Com. 335, 348-52 (2000) (criticizes Stevens v. The White City, recognizing "distinct disadvantage" facing unmanned barge "if no log entry records the mishap" and argues that "two alternative rules (towage of a manned tow – non-bailment; towage of an unmanned tow – bailment) instead of one (non-bailment)" would "deter negligence" and improve "safety."); 2 Thomas J. Shoenbaum, Admiralty and Maritime

Law §12-4 at 252 (2001)("The rule of The White City has little persuasive power where the tow is unmanned."); Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd., 1995 A.M.C. 1558, 1567-68 (Can. Fed. Ct. 1995) (criticizes "strange" Stevens v. The White City non-bailment rule for unmanned towage).

b. The opinions below establish mistakes of fact

Petitioner is aware that certiorari petitions are rarely granted based on asserted erroneous factual findings, Sup. Ct. R. 10, and will not brief all of the lower courts' mistakes. Nevertheless, several factual errors are presented for the Court's consideration pursuant to Sup. Ct. R. 14.4 to show that the lower courts have reached the wrong result.

First, it was indeed a mistake of fact for the district court to conclude the do-si-do[4] conspiracy did not happen because the New Bedford-Fairhaven bridgetender did not observe "a certain leg of the voyage." The First Circuit was then wrong to conclude that the district court's "four-word parenthetical," App. B at 18a, did not serve as a ground for the district court's decision. See 251 F.3d at 300 n.5; App. A at 5a n.5.

In fact, the district court found that "[t]he extant records shedding light on the contemporaneous movements

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[4] The Random House Dictionary of the English Language 585 (2d ed. 1987): "a figure in square-dancing, in which two persons advance, pass around each other back to back, and return to their places."

of VENUS and the ALGOL 500" included the bridgetender's records, App. B at 13a, and concluded that those records "contradicted" VENUS and ALGOL 500 movements on the morning of June 16, App. B at 17a. That constitutes a triple mistake of fact because not just one but none of three legs[5] of the do-si-do would have passed under the bridge. In other words, the trial judge geographically misplaced the bridge and wrongly concluded that the absence of those three legs from the bridgetender's records refutes the do-si-do.

Second, the First Circuit opinion also curiously states that the district court "found no evidence in the record to corroborate" Petitioner's conspiracy theory. 251 F.3d at 300; App. A at 5a. On top of omitted log entries and Coast Guard reports, affirmative corroborative evidence of a do-si-do conspiracy includes the following undisputed facts: (1) the VENUS/barge flotilla arrived at Fairhaven Shipyard at the end of Leg 1 *before sunrise*; (2) whereupon the only credible witness aboard, David Correia, *quit immediately*, leaving Respondents' two principals, Conrad Roy Jr. and Sr. alone; (3) Roy Jr. testified after the grounding he remembers returning to Fairhaven Shipyard in *broad daylight* (i.e., Leg 3); and (4) Roy Jr. and Sr. *both admitted the possibility VENUS grounded on June 15, 1994 with ALGOL 500.* Reply Brief for Appellant Tisbury Towing & Transportation Co., Inc. at 5-6 and 8 n.1, citing record.

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[5] Leg 1, VENUS/barge transit from Woods Hole grounding site to Fairhaven shipyard; Leg 2, VENUS/barge transit from Fairhaven Shipyard to Martha's Vineyard; Leg 3, VENUS transit from Martha's Vineyard to Fairhaven Shipyard.

Third, the trial judge not only speculated ALGOL 500 was damaged while towed by Petitioner, 251 F.3d at 300 n.4; App. A at 5a n.4, he was wrong about its internal structure and inspection procedures. In fact, Conrad Roy Sr. gave two contradictory accounts regarding how the barge was made up to VENUS when it grounded and regarding near surface rock locations. Also, despite overriding safety concerns after the grounding, Respondent disingenuously never bothered to find out the barge's name or inspect it. Reply Brief for Appellant Tisbury Towing & Transportation Co., Inc. at 6-7, 12 n.2 and 14-15 citing record; Tr. II at 68.

2. The First Circuit's Opinion Dangerously Encourages Concealment of Marine Casualties

If not reversed, Tisbury Towing & Transportation Co. v. VENUS and Tucker-Roy Marine Towing & Salvage, Inc., 251 F.3d 298 (1st Cir. 2001); App. A, will discourage vessels involved in marine casualties from providing notice to the Coast Guard as required by 46 C.F.R. Part 4. Maritime disasters like the following examples will result.

First, like here, a tug runs aground with a barge, extensively damaging the barge's internal hull plating and framing, but luckily not quite holing it. Not finding any visible damage above the waterline, the tug does not give notice of the marine casualty to the Coast Guard, although required by 46 C.F.R. § 4.05-1(a)(1)(1998); App. D at 24a. Months pass and the barge is loaded with U.S. military equipment, cargo that is heavier than the barge has carried since the grounding, but well within its Coast Guard

inspection certificate. In choppy seas a stress fracture opens at the pre-existing grounding damage, the barge founders, and the cargo sinks.

Second, a fishing vessel intentionally goes aground one evening to rig its tuna pulpit as the lucrative bluefin season heats up but in so doing damages its propeller shaft causing a leak at the stuffing box. The Owner/Master makes no report to the Coast Guard as required by 46 C.F.R. § 4.05-1(a)(2)(1998); App. D at 24a, and the vessel hurriedly departs for the fishing grounds. While fighting a 750 pound fish, the bilge pump is unable to keep up with the leak and the vessel sinks, entangling the lone crewman who drowns.

Third, a U.S. flagged oil tanker en route from Alaska with a full load of crude experiences a loss of primary steering, which it does not report to the Coast Guard as required by 46 C.F.R.§ 4.05-1(a)(3)(1998); App. D at 25a. While entering the Straits of Juan de Fuca in a north wind, the steering loss recurs, grounding the tanker on the Olympic Peninsula and causing a serious spill.

Fourth, a foreign flagged container ship after discharging cargo in Houston sustains a small engine room electrical fire that is easily contained even though the fixed fire-extinguishing system fails to operate. In an effort to maintain its tight schedule, no report to the Coast Guard is made as required by 46 U.S.C. § 4.05-1(a)(4)(1998); App. D at 25a, but another fire ignites leading to an explosion and stranding of the ship, blocking the shipping channel for three weeks.

Fifth, a cargo ship leaves a California port in fog

and runs over a fishing vessel ten miles off the coast. The ship seeks to evade responsibility due to the presence of other large ships in the general vicinity and not stopping, maintains course and speed for its next port of call. The ship does not report the hit and run collision, which constitutes a marine casualty pursuant to 46 C.F.R. § 4.03-1 (1980); App. D at 23a-24a, as required at a minimum by 46 C.F.R. § 4.05-1(a)(7) (1998); App. D at 25a. The fishing vessel's captain is found alive the next morning in a life raft but his three crewman all die.

In each scenario, had the initial marine casualty been reported as required, the Coast Guard likely would have timely assisted, 46 C.F.R. § 4.01-1 (1986); App. D at 23a, and the more serious results could well have been avoided. Dangerously, the First Circuit opinion here discourages marine casualty reporting to the detriment of maritime safety. It should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted to deter marine casualties.

Respectfully submitted,

David J. Farrell, Jr.
CONNORS & FARRELL
Routes 28 and 137
P.O. Box 186
S. Chatham, MA 02659
508.432.2121
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 00-2415

[June 5, 2001, Entered]

TISBURY TOWING & TRANSPORTATION CO., INC., F/K/A PACKER MARINE, INC., Plaintiff, Appellant,	)
v.	)
TUG VENUS AND TUCKER-ROY MARINE TOWING & SALVAGE, INC., Defendants, Appellees.	)

Appeal from the United States District Court
for the District of Massachusetts

Richard G. Stearns, District Judge

Selya, Circuit Judge, Coffin, Senior Circuit Judge,
and Lynch, Circuit Judge.

OPINION

PER CURIAM. Packer Marine, Inc.[1] sues the defendants -- the tug VENUS and its owner, Tucker-Roy Marine -- for negligently grounding its barge, the ALGOL 500. The case received a bench trial, resulting in judgment for the defendants. The trial court found that Packer had not met its burden of proving when the grounding incident in question occurred and therefore could not show that the VENUS had ever grounded while towing the ALGOL 500. Packer appeals, arguing that the district court clearly erred in finding that Packer had not adequately established the date of the grounding, and that in any event, the burdens of production and proof as to when the grounding occurred should have been shifted to the defense. Upon a careful review of the record in this factually close case, we affirm the judgment of the district court.

The essential facts of the case are as follows: Packer discovered damage to the ALGOL 500 in March 1995, and after some investigation it came to suspect Tucker-Roy. This suit followed. Before trial, Tucker-Roy admitted, via stipulation, that the VENUS ran aground at Woods Hole, Massachusetts, while pushing one of Packer's barges on some evening between June 1 and June 20, 1994; but Tucker-Roy denied that the barge involved was damaged, and it professed agnosticism as to whether the barge involved was the ALGOL 500, as opposed to one of Packer's other two deck barges. At trial, Packer proffered considerable circumstantial evidence

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[1] We refer to the plaintiff using the name under which it was doing business at the time of the events at issue.

that the grounding occurred specifically on the evening of June 15. [2] That date is significant, because only the ALGOL 500 was available for towing on the evening of June 15; Packer's other two barges were moored in New Bedford harbor at the time. In short, a conclusion that the date of the grounding was June 15 would imply that the VENUS ran aground while hauling the ALGOL 500.

The trial court, however, found that conclusion problematic for the following reasons. Both parties agreed that the grounding occurred while the VENUS was headed westbound from Martha's Vineyard to New Bedford. According to VENUS crew member David Correia, whom the district court found very credible, after an incoming tide freed the VENUS from the ledge at Woods Hole, the tug

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[2] Briefly, Packer's circumstantial evidence of the date of the grounding was as follows. First, Packer sought to rule out all other dates between June 1 and June 20 by reference to extant records: invoices show Tucker-Roy towing Packer's barges only from June 1 to June 4 and June 14 to June 16; on all of these dates except for June 14 and June 15, the names of the crew recorded in the VENUS log do not match the crew that the parties stipulate was aboard the VENUS at the time of the grounding; and as between June 14 and June 15, on the former date, the New Bedford-Fairhaven bridgetender's records place the VENUS at the bridge at an evening hour, leaving no time for a westbound grounding at Woods Hole that evening. Second, Packer's expert testified that, based on the testimony of the crew members aboard the VENUS at the time of the grounding, whose testimony included statements that the grounding occurred at a sunset low tide in foggy conditions, the most likely date of the grounding was June 15, according to tide tables and weather records.

proceeded on to New Bedford, arriving sometime in the early morning of June 16. Yet, on June 16, certain records (uncontested by Packer) indicate that on that date the VENUS transported the ALGOL 500 westbound from Martha's Vineyard to New Bedford. [3] Thus, if plaintiff's theory that the grounding occurred on June 15 is to be believed, it must also be believed that immediately after arriving in New Bedford after the grounding, the VENUS turned around, transported the ALGOL 500 back to Martha's Vineyard, and then transported it back again to New Bedford later that day (completing a "do-si-do," to use plaintiff's term).

While the district court found that, as a matter of physics, the VENUS could have traveled this circuitous route in the time period posited (at least if running at full speed in ideal conditions), it nonetheless found that, as a matter of motive, the scenario was implausible. In particular, it questioned why the VENUS would have towed the ALGOL 500 from Martha's Vineyard to New Bedford on the evening of June 15, only to turn around and make the same trip again the next day, for no apparent reason. Packer urged a conspiratorial motive for the do-si-do: it argued that Tucker-Roy sought to cover its tracks, by sneaking the ALGOL 500 back to Martha's Vineyard and towing it again on the evening of June 16, so as to make it appear as if the ill-fated voyage of the previous night had never occurred. But the district

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[3] Packer does not contend that June 16 could have been the date of the grounding, since the crew aboard the VENUS on that date (according to the VENUS log) does not match the crew that both parties agree was aboard at the time of the grounding.

court saw little logic behind the conspiracy theory, and found no evidence in the record to corroborate it. [4] Consequently, the district court found that Packer had failed to meet its burden of proving that the grounding stipulated to by the parties occurred on June 15, a fact on which plaintiff concedes its theory of causation depends.

On appeal, Packer argues that its circumstantial evidence that the grounding occurred on June 15 is so persuasive as to necessitate a finding that the conspiratorial do-si-do occurred, regardless of how implausible the conspiracy theory may be in the abstract. We acknowledge that Packer's circumstantial evidence of the date of the grounding is strong, but we simply cannot say that it is so impervious to doubt as to render the trial court's judgment clearly erroneous. Packer's circumstantial case did, after all, ultimately rest on records that were not wholly accurate and complete, and on the testimony of witnesses whose memories were not entirely clear and consistent. The trial judge thus acted within his bounds in finding that the evidence, when leveraged against the implausibility of the conspiratorial do-si-do story, was not weighty enough to tip the scales in the plaintiff's favor. [5]

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[4] The court further speculated that it was just as likely that the ALGOL 500 was damaged sometime in 1994-95 while in the hands of the plaintiff, who towed the barge using its own tug approximately ninety percent of the time.

[5] Packer also contends that the district court's conclusion rests on a mistake of fact, in that the court, in describing the hypothesized do-si-do, remarked that the VENUS was apparently unobserved by the New Bedford-Fairhaven bridgetender on a

In addition to challenging the district court's factual findings, Packer also argues that the district court committed legal error by not shifting to the defense the burden of production or proof as to the date of the grounding incident. Given that Tucker-Roy did not make any record of the incident in the VENUS log, nor report the incident to the Coast Guard as required under Coast Guard regulations, see 46 C.F.R. § 4.05-1, Packer argues that it is Tucker-Roy's fault that there is no direct evidence of the date of the grounding. Accordingly, Packer contends, the defendants should bear the burden of producing evidence of when the incident occurred; Tucker-Roy should not be allowed to benefit from its own lack of documentary diligence.

However, Packer does not point us to, and we have been unable to locate, any case standing for the proposition that a defendant's failure to report an accident has any effect on the allocation of burdens. Packer does cite to Sternberg Dredging Co. v. Moran Towing & Transp. Co., 196 F.2d 1002 (2d Cir. 1952) (L. Hand, J.), for the proposition that: "It is often a controlling factor in deciding where to throw the

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certain leg of the voyage. Packer argues that the VENUS would not have had to pass under the bridge during the course of the do-si-do, so the court's suggestion that the tug would have been observed by the bridgetender during the do-si-do was mistaken. We are not convinced that the district court was mistaken in its remark, but in any event the remark -- merely a four-word parenthetical -- was made in the course of the court's exegesis of the plaintiff's theory, not in the court's rejection of it. There is simply no indication that the belief expressed by the remark to any extent served as a ground for the district court's decision.

burden of producing evidence . . . that the proper party to charge is he who alone could discover the truth." Id. at 1006. But taken in isolation that proposition is clearly an overstatement. See Stevens v. The White City, 285 U.S. 195, 202-03, 76 L. Ed. 699, 52 S. Ct. 347 (1932) (holding that, as to allocation of burdens, it is not "material that the facts of the case, and the causes of the collision, are peculiarly within the knowledge of the respondents. . . . We are not aware [ ] of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties." (internal quotation marks omitted)).

Rather, the core holding of Sternberg Dredging is simply that, where a defendant negligently fails to inspect a barge in tow after it appears to be damaged, the defendant will be presumed at fault if the barge founders soon thereafter. See South, Inc. v. Moran Towing & Transp. Co., 360 F.2d 1002, 1006 (2d Cir. 1966). The case at bar, by contrast, is a long step away from this fact pattern. Here, the pivotal question is not whether Tucker-Roy's negligence in running aground while towing the ALGOL 500 should be presumed to have caused its damage; rather, the pivotal question is whether, when the grounding occurred, Tucker-Roy was towing the ALGOL 500 in the first place. The same distinction undermines all of the plaintiff's other citations to maritime cases shifting burdens of production or proof to the defendant: in all of the cases, there was no issue as to whether the defendant was towing plaintiff's barge when it was damaged; the issue was whether, given that the defendant was towing the barge when it was damaged, fault should be presumed. See, e.g., Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151, 1160 (2d Cir. 1978) (citing The Pennsylvania, 86 U.S. (19 Wall.) 125, 136, 22 L. Ed. 148 (1874)); Mid-

America Transp. Co. v. Nat'l Marine Serv., Inc., 497 F.2d 776, 777-78 (8th Cir. 1974); The Clarence P. Howland, 16 F.2d 25, 26 (2d Cir. 1926).

In conclusion, we cannot say there was clear error in the trial court's refusal to find that the VENUS ran aground on June 15 with the ALGOL 500 in tow; nor did the court err as a matter of law in not reallocating burdens on the issue. Accordingly, the judgment of the trial court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

[Filed: October 2, 2000]

NO. 97-11392-RGS

PACKER MARINE, INC.	)
	)
v.	)
	)
TUG VENUS, in rem, AND	)
TUCKER-ROY MARINE	)
TOWING & SALVAGE, INC.,	)
in personam	)
	)

FINDINGS OF FACT AND RULING
OF LAW AFTER A NON-JURY TRIAL

The sea can be a perilous place for even a dumb barge.[1] So it was for the ALGOL 500, a barge owned by plaintiff Packer Marine, Inc. (Packer Marine). On March 9,

[1] A "dumb" barge is a cargo vessel with no internal locomotive power. Its seafaring capacity is thus dependent on a tug's push or tow.

1995, during a routine Coast Guard inspection, the bottom of the ALGOL 500 was found staved and buckled. Packer Marine decided that the wounds had been inflicted on the night of June 15, 1994, while the ALGOL 500 was under tow by the tug VENUS, the flagship of defendant Tucker-Roy Marine Towing & Salvage, Inc. (Tucker-Roy), and that Tucker-Roy had engaged in an elaborate coverup to deflect blame. Tucker-Roy, predictably, denied any responsibility for the damage. The ensuing litigation culminated in this trial.

FINDINGS OF FACT

Based on the credible evidence, I find the following material facts.

1. Packer Marine is a Massachusetts corporation in the business of transporting bulk commodities from the Port of New Bedford to the Islands of Martha's Vineyard and Nantucket. Packer Marine operates docking and loading facilities at North Terminal in New Bedford and at its principal place of business in Vineyard Haven. In addition to the ALGOL 500, Packer Marine owns a sister barge, the ALCAID 400, and leases a third of nearly identical design, the HYDRA 700. The tug THUBAN is owned by a Packer Marine subsidiary, Tisbury Towing and Transportation, Inc. (Tisbury). In 1994 and 1995, Tisbury and the THUBAN filled over ninety percent of Packer Marine's towing needs.

2. Tucker-Roy is a Massachusetts corporation operating a marine towing and salvage business from the New Bedford-Fairhaven Shipyard. Tucker-Roy owns the tug VENUS, which it acquired in 1993.

3. The ALGOL 500 is an open deck freight barge of welded steel construction. It is 130 feet long, 35 feet wide, and 8.6 feet deep. When empty, it draws 1½ to 2 feet. It has six below deck cargo compartments.

4. The tug VENUS is of riveted steel construction. It is 72.5 feet long, 20 feet wide, and draws 8.4 feet. The VENUS's home berth is at Fairhaven Shipyard.

5. Tucker-Roy towed Packer Marine's ALGOL 500, ALCAID 400 and HYDRA 700 between New Bedford, Vineyard Haven and Nantucket on an as-needed basis. There was no formal contract between the two companies.

6. Packer Marine's barges were inspected annually by the Coast Guard and the American Bureau of Shipping (ABS). On April 7, 1994, a drydock inspection of the ALGOL 500 found no damage to its bottom.

7. On March 9, 1995, during an in-water inspection, Coast Guard officials and ABS inspectors observed extensive damage to the ALGOL 500's internal hull plating and framing. Subsequent out-of-water inspections revealed extensive damage to the barge's bottom and starboard side. Repair costs and loss of service charges are estimated to total $110,160. This figure is not in material dispute.

8. On March 23, 1995, Ralph Packer, the President of Packer Marine, telephoned Conrad Roy, Sr., the President of Tucker-Roy, to ask about possible grounding incidents. Roy Sr. told Packer that the VENUS had twice run aground while pushing Packer Marine barges, once on Middle Ledge in Woods Hole and once on Parker Flats. Roy Sr. denied that in

either instance had the barge in tow also been grounded.

9. With respect to the Middle Ledge grounding, the parties stipulated at trial as follows:

> VENUS grounded on or in the vicinity of Middle Ledge in Woods Hole Passage during June 1994 while pushing a deck barge owned by Packer Marine. The grounding occurred sometime during the evening hours while the VENUS and the barge were traveling westbound to New Bedford. The barge was not laden with cargo and was drawing approximately 1 ½ to 2 feet fore and aft.

10. The parties further stipulated that at the time of the grounding the VENUS was crewed by Roy Sr., his son, Roy Jr., and David Correia. According to Correia, the VENUS rode free on the high tide after being aground on Middle Ledge for approximately six hours. No member of the crew could remember the precise date of the grounding, although Roy Sr. at his deposition recollected that it had been in June, perhaps a week or so before the VENUS was hauled out for an insurance inspection.

11. At the June 20, 1994 inspection, a small indentation was found on the port side of the VENUS's hull, necessitating a minor welding repair.

12. No entry reflecting the grounding on Middle Ledge was made in the VENUS's log. Nor was the grounding reported to the Coast Guard.

13. The extant records shedding light on the contemporaneous movements of the VENUS and the ALGOL 500 are the VENUS's logbook, the bridgetender's records for the Route 6 New Bedford-Fairhaven swing bridge, the invoices submitted by Tucker-Roy to Packer Marine for towing services, and Packer Marine's tug booking sheets.

14. According to its log, the VENUS departed at 7:15 p.m.[2] on June 14, 1994, from North Terminal in New Bedford, with the ALGOL 500 in tow, en route to Vineyard Haven. The bridgetender's report for June 14, 1994, recorded the passage of the VENUS and the ALGOL 500 at the Route 6 bridge at 7:20 p.m. with the note "barge over loaded with gravel." The VENUS and the ALGOL 500 arrived in Vineyard Haven around midnight. The VENUS's log contains no entries for June 15, 1994, but the bridgetender's report recorded the VENUS bound upstream with the ALCAID 400 and the HYDRA 700 in tow at 2:15 p.m. that day.[3] At 3:15

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[2] I have used conventional rather than military timekeeping.

[3] Packer Marine maintains that the page containing the June 15, 1994 entries was deliberately removed from the logbook as part of the Tucker-Roy coverup. Plaintiff's Proposed Finding 22. The book, however, shows no physical signs of tampering. (The pages are sequentially numbered and the binding is intact). The more likely explanation for the missing entries is that they were not as a rule made contemporaneously, but entered by the captain from notes at the end of each day (the general evenness of the handwriting supports that view), and that the June 15 entries were inadvertently, or perhaps deliberately, omitted.

p.m., according to the daily bridge port, the VENUS passed under the bridge with no barge in tow, proceeding in the direction of Fairhaven Shipyard. The next day, June 16, 1994, the ship's log indicates that the VENUS embarked from Fairhaven Shipyard at 10:45 a.m. en route to North Terminal. The log is corroborated by the daily bridge report which recorded the VENUS's 11:23 a.m. upstream passage. The ship's log has the VENUS departing at 1:00 p.m. for Vineyard Haven with the HYDRA 700 in tow. There is no notation of the VENUS's downstream passage in the June 16 daily bridge report, however, the bridge was opened at 1:15 p.m. to permit the fishing vessel KISMET to pass. The parties agree that bridgetender did not see, or failed to record, the simultaneous passage of the VENUS. The ship's log and the daily bridge report agree that the VENUS passed the bridge at 9:30 p.m. on the evening of June 16 heading to North Terminal with the empty ALGOL 500 in tow.

15. A Tucker-Roy invoice dated June 20, 1994, billed Packer Marine for the June 14, 1994 delivery of a barge loaded with stone (the ALGOL 500) to Vineyard Haven and the return tandem tow on June 15th of two unloaded barges (the ALCAID 400 and the HYDRA 700). The invoice further indicates that on June 16th, the VENUS delivered the loaded HYDRA 700 to Vineyard Haven, and towed the empty ALGOL 500 back to New Bedford.

16. Packer Marine's tug tracking records indicate that on June 16th, the VENUS was engaged to tow the ALGOL 500 that day to New Bedford.

17. In the fall of 1995, while berthed at North Terminal, the ALGOL 500 broke free of its moorings and ran

aground in New Bedford harbor. Packer Marine did not report the incident to the Coast Guard.

RULINGS OF LAW

Because the owner of a tug is not the bailee of its tow, Packer Marine has the burden of proving that negligence on the part of Tucker-Roy was the cause of any damage to the ALGOL 500. Stevens v. The WHITE CITY, 285 U.S. 195, 200 (1932). To sustain that burden, Packer Marine must, within reason, establish the time, place and cause of the damage. Elizabeth Turner, Inc. v. Tug LUCKY D, 941 F. Supp. 439, 443-444 (S.D.N.Y. 1996), quoting The WHITE CITY, 285 U.S. at 203-204. Without such proof, no inference of negligence can be drawn against the VENUS. Cf. Complaint of Nautilus Motor Tanker Co., 85 F.3d 105, 116 (3d Cir. 1996).

DISCUSSION

"This case turns on the specific evening in June 1994 [that the grounding occurred]; the identity of the Packer Marine deck barge VENUS was pushing when it grounded; and how much damage the barge sustained." Plaintiff's Proposed Finding 16. Packer Marine contends that the VENUS went aground on Middle Ledge on the evening of June 15, 1994, and that the ALGOL 500 was damaged during the VENUS's subsequent attempts to extricate itself.[4] The

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[4] Captain Barry Fuller, Packer Marine's expert, testified to two possible scenarios, both involving a premature turn by the

evidence offered in support of this hypothesis is as follows: (1) the "glaring" absence of any log entries documenting the VENUS's movements on June 15th; (2) the absence of any record indicating that a crew made up of Roy Sr., Roy Jr., and David Correia manned the VENUS on any other day in June;[5] (3) Roy Sr.'s deposition testimony that the VENUS was hauled out "maybe a week or so" after the grounding; and (4) most significantly, the expert testimony of Captain Barry Fuller.[6] In the opinion of Captain Fuller, the VENUS went aground on Middle Ledge at precisely 8:30 p.m. on June 15th. Tr. I, 121,124. Captain Fuller bases his opinion on his navigational experience and knowledge of the tides in Woods Hole and on certain statements made by the crew at their depositions, specifically, Roy Sr.'s testimony regarding the date of the VENUS's haulout and David Correia's testimony that the grounding occurred at sunset during a low tide. Using the Eldrige Tide and Pilot Book for 1994, Captain Fuller determined that sunset on June 15, 1994, occurred at 8:20 p.m., while the tide reached its bi-weekly ebb in Woods Hole

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VENUS out of Broadway Channel resulting in a collision with a submerged rock. Tr. II, 11-13; Ex. 25.

[5] There is no record of the makeup of the VENUS's crew on June 15th.

[6] Plaintiff also argues that the fact that Tucker-Roy never billed Packer Marine for towing the ALGOL 500 back and forth to Vineyard Haven on June 15th is a "smoking gun." Plaintiff's Proposed Finding 39. This argument only makes sense if one accepts plaintiff's theory that TuckerRoy was involved in a "dastardly" coverup of the movements of the VENUS and the ALGOL 500 on June 15th.

at 8:28 p.m. (The previous low ebb occurred on May 29, the next ebbtide would have occurred on June 29).[7]

The obvious defect in Captain Fuller's theory is that it is contradicted by the extant records tracking the movements of the VENUS and the ALGOL 500 between June 14th and 16th.[8] These place the VENUS and the ALGOL 500 at Vineyard Haven at midnight on June 14th. They contain no hint that the ALGOL 500 left its dock in Vineyard Haven before it was towed to New Bedford by the VENUS on June 16th. They also confirm that at 10:45 a.m. on the morning of June 16th, the VENUS was at its berth in Fairhaven Shipyard. On June 15th, the VENUS was seen by the bridgetender entering New Bedford Harbor at 2:15 p.m. with the ALCAID 400 and the HYDRA 700 in tow, returning from the previous night's trip to Vineyard Haven. The next documented movement of the VENUS on June 15th occurred at 3:15 p.m. when the bridgetender observed the tug bound downstream in the direction of Fairhaven Shipyard.

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[7] Captain Fuller testified that his tides and sunset theory was not inconsistent with a grounding on June 14th or June 16th, although in his view the June 15th scenario provides the best "fit." Tr. II, 16, 19. The parties agree that the documentary evidence excludes either of these days as the day of the grounding. Plaintiff's Proposed Finding 21; Defendant's Proposed Finding 19.

[8] Captain Fuller conceded that he had not examined these records, nor had he made any independent investigation to determine the movements of the VENUS and the ALGOL 500. Tr. II, 24, 29.

If the VENUS had in fact returned to its berth in Fairhaven on the afternoon of June 15th, how could the grounding have occurred later that night? Packer Marine's theory is that the VENUS, instead of returning to Fairhaven Shipyard, proceeded to Vineyard Haven where it took the ALGOL 500 in tow sometime after 6:00 p.m.[9] From there, the VENUS sailed to the 8:30 p.m. disaster at Middle Ledge. Packer Marine next speculates that the VENUS, after freeing itself at high tide in the early morning hours of June 16,[10] continued on to New Bedford. There, after discovering the damage to the ALGOL 500, Roy Sr. decided to coverup the VENUS's tracks by sneaking the barge back to Vineyard Haven, where it was deposited at dawn on June 16 (before the Packer Marine terminal opened). The VENUS then returned (unobserved by the bridgetender) to New Bedford, docked briefly at Fairhaven Shipyard, and then with the HYDRA 700 in tow, set off again to Vineyard Haven, where it reclaimed the ALGOL 500. (Packer Marine characterizes this "dastardly act of nautical obfuscation" as the "do-si-do.") Plaintiff's Proposed Finding 39.

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[9] According to Packer Marine, the Vineyard Haven terminal closed at 6:00 p.m., which would explain why no Packer Marine employee saw the VENUS arrive to collect the ALGOL 500.

[10] Roy Sr. estimated that the VENUS was aground for three hours on whatever day the grounding occurred. Tr.II, 66. David Correia, whom I found very credible, testified to five or six hours. Tr. II, 39,42. Captain Fuller estimated that the grounding, if it occurred on June 15th, would have lasted five to six hours given tidal fluctuations that day in Woods Hole. Tr. II, 14.

Could this have happened? One could suppose it possible. Running at full speed in ideal conditions the VENUS might have been capable of achieving this Argonautical tour de force.[11] When, however, measured against the evidence and the most elementary appreciation of human behavior, it makes no sense. One would, for example, question why the VENUS would have embarked to Vineyard Haven on June 15 to undertake a gratuitous tow of the ALGOL 500 to New Bedford. (It will be remembered that Packer Marine's records indicate that the tow was not ordered until June 16th). If a pell-mell coverup voyage had been undertaken to Vineyard Haven in the early morning hours of June 16, why would David Correia, the only disinterested witness to testify at trial, not have noticed preparations for the frantic turnaround? What assurances would Roy Sr. have had that the ALGOL 500's cargo of crushed stone had been unloaded in the interim? Why, if Roy Sr. was aware that the ALGOL 500 had been damaged during the grounding, would he not have made a show of discovering the damage when he arrived to pick up the ALGOL 500 on June 16th? Perhaps most telling, it will be recalled that during the March 9, 1995 in-water inspection of the ALGOL 500, Coast Guard and ABS inspectors easily discovered the damage to the barge's bottom from an internal inspection of the below deck compartments. How probable is it that this same damage would have gone unnoticed by Packer

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[11] The VENUS's log and Roy Jr.'s testimony at trial suggest that in ideal conditions, the VENUS was capable of making the round trip from New Bedford to Vineyard Haven in six to eight hours with an unloaded barge in tow. Ex. 8; Tr. II, 81-82.

Marine employees for some nine months?[12]

This is not to say that it is out of the realm of possibility that at some time while the ALGOL 500 was in the custody of the VENUS it suffered damage as a result of negligence attributable to Tucker-Roy. But it is a virtual certainty that this did not happen on June 15, 1994, on the proof of which Packer Marine concedes the case turns.

ORDER

For the foregoing reasons, judgment shall enter for defendant Tucker-Roy Marine Towing & Salvage, Inc.

SO ORDERED,

/s/_____
Richard G. Stearns

[12] The likelihood that the damage occurred when the ALGOL 500 broke from its moorings in the fall of 1994 is, for temporal reasons alone, perhaps a more plausible conjecture, as is the possibility that the damage occurred while the barge was being towed, as was ordinarily the case, by Tisbury's tug THUBAN.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Entered: May 4, 2001]

No. 00-2415

TISBURY TOWING & TRANSPORTATION CO., INC., Plaintiff-Appellant	)
v.	)
TUG VENUS O.N. 203547; TUCKER- ROY MARINE TOWING & SALVAGE, INC., Defendant-Appellee.	)

ORDER

Upon consideration of appellant's request to use an enlarged version of a demonstrative exhibit,

It is ordered that said request is granted.

By the Court:

PHOEBE D. MORSE, Clerk

/s/_____
Janice M. O'Neil
Chief Deputy Clerk

STIPULATED:
Westbound evening grounding in Woods Hole involving 1 of 3 similar light Tisbury Towing deck barges between June 1-19 with Roy Sr., Roy Jr., and Correia aboard, A. 14-16

JUNE 1994

			1 A. 71-73	2 WRONG	3 CREW	4 Tr. Day 2 at 52-54
5	6	7	8	9	10	11

NO VENUS Log entries, A. 71-74, which Roy Sr., aboard for all June 1994 trips, A. 154, would require the captain to record, A. 147

NO Tucker-Roy invoices showing any VENUS work for Tisbury Towing, A. 43-45

12 ditto	13 ditto	14 WRONG WAY A.72 Tr. Day2 at 54-55 WRONG CREW Add. 7n.7	15 • Best fit for sunset low tide, Tr. Day 1 at 123-24, Day 2 at 16, 19	16 WRONG CREW A.73 Tr. Day2 at 75-76 WRONG HOLE Add. 7n.7	17 ditto	18
19 ditto	20 VENUS hauled out A. 63					

- ALGOL 500 hull damage due to Middle Ledge grounding and ungrounding, Tr. Day 2 at 11-17
- Tardily produced, missing VENUS log entries, A. 72-73
- VENUS whereabouts unrecorded for 19.5 hours after 3:15 pm, A. 136, 73
- Barge involved in grounding O/A June 14/19 was ALGOL 500, A. 108, 154-55, consistent with tandem tow of similar barges north of swing bridge, A. 136; Tr. Day 2 at 55-56
- Week or so before VENUS hauled out, Tr. Day 2 at 52; A.167
- 15th is possible per both Roys, Tr. Day 2 at 55, 76-77; A. 184-85, 188-89

APPENDIX D

46 CFR Part 4
Marine Casualties and Investigations
current excerpts

46 CFR § 4.01-1 (1986)

Scope of regulation.

The regulations in this part govern the reporting of marine casualties, the investigation of marine casualties and the submittal of reports designed to increase the likelihood of timely assistance to vessels in distress.

46 CFR § 4.03-1 (1980)

Marine casualty or accident.

(a) The term marine casualty or accident shall mean any casualty or accident involving any vessel other than public vessels if such casualty or accident occurs upon the navigable waters of the United States, its territories or possessions or any casualty or accident wherever such casualty or accident may occur involving any United States' vessel which is not a public vessel. (See § 4.03-40 for definition of Public Vessel.)

(b) The term marine casualty or accident includes any accidental grounding, or any occurrence involving a vessel which results in damage by or to the vessel, its apparel, gear, or cargo, or injury or loss of life of any person; and includes among other things, collisions, strandings, groundings, founderings, heavy weather damage, fires, explosions, failure of gear and equipment and any other damage which might affect or impair the seaworthiness of the vessel.

(c) The term marine casualty or accident also includes occurrences of loss of life or injury to any person while diving from a vessel and using underwater breathing apparatus.

46 CFR § 4.05-1 (1998)

Notice of marine casualty.

(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in --

(1) An unintended grounding, or an unintended strike of (allison with) a bridge;

(2) An intended grounding, or an

intended strike of a bridge, that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (7);

(3) A loss of main propulsion, primary steering, or any associated component or control system that reduces the maneuverability of the vessel;

(4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, lifesaving equipment, auxiliary power-generating equipment, or bilge-pumping systems;

(5) A loss of life;

(6) An injury that requires professional medical treatment (treatment beyond first aid) and, if the person is engaged or employed on board a vessel in commercial service, that renders the individual unfit to perform his or her routine duties; or

(7) An occurrence causing property-damage in excess of $25,000, this damage including the cost of labor and material to restore the property to its

condition before the occurrence, but not including the cost of salvage, cleaning, gas-freeing, drydocking, or demurrage.

(b) Notice given as required by 33 CFR 160.215 satisfies the requirement of this section if the marine casualty involves a hazardous condition as defined by 33 CFR 160.203.

46 CFR § 4.05-5 (1980)

Substance of marine casualty notice.

The notice required in § 4.05-1 must include the name and official number of the vessel involved, the name of the vessel's owner or agent, the nature and circumstances of the casualty, the locality in which it occurred, the nature and extent of injury to persons, and the damage to property.

46 CFR § 4.05-10 (1998)

Written report of marine casualty.

(a) The owner, agent, master, operator, or person in charge shall, within five days, file a written report of any marine casualty required to be reported under § 4.05-1. This written report is in addition to the immediate notice required by § 4.05-1. This written report must be delivered to a Coast Guard Marine Safety Office or Marine Inspection Office. It must be provided on Form CG-2692

(Report of Marine Accident, Injury or Death), supplemented as necessary by appended Forms CG-2692A (Barge Addendum) and CG-2692B (Report of Required Chemical Drug and Alcohol Testing Following a Serious Marine Incident).

(b) If filed without delay after the occurrence of the marine casualty, the report required by paragraph (a) of this section suffices as the notice required by § 4.05-1(a).

46 CFR § 4.05-15 (1974)

Voyage records, retention of.

(a) The owner, agent, master, or person in charge of any vessel involved in a marine casualty shall retain such voyage records as are maintained by the vessel, such as both rough and smooth deck and engine room logs, bell books, navigation charts, navigation work books, compass deviation cards, gyro records, stowage plans, records of draft, aids to mariners, night order books, radiograms sent and received, radio logs, crew and passenger lists, articles of shipment, official logs and other material which might be of assistance in investigating and determining the cause of the casualty. The owner, agent, master, other officer or person responsible for the custody thereof, shall make these records available upon request, to a duly authorized investigating officer, administrative law judge, officer or employee of the Coast Guard....

Supreme Court, U.S.
FILED
OCT 19 2001
OFFICE OF THE CLERK

No. 01-0319

In The

Supreme Court of the United States

TISBURY TOWING & TRANSPORTATION CO., INC.,
f/k/a PACKER MARINE, INC.,

Petitioner,

v.

TUG VENUS and TUCKER-ROY
MARINE TOWING & SALVAGE, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION

NORMAN A. PELOQUIN, II
Counsel of Record

LAW OFFICE OF
NORMAN A. PELOQUIN, II
Morad Building, 460 County Street
New Bedford, MA 02740-5107
Tel. (508) 991-2300

Attorney for Respondents
Tug Venus and Tucker-Roy Marine
Towing & Salvage, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Should the burden of production shift to Respondent because it did not report the grounding of Tug VENUS as required by 46 C.F.R. § 4.05-1 (1988)?

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BRIEF IN OPPOSITION

Tug VENUS and its owner, Tucker-Roy Marine Towing & Salvage, Inc., Respondents herein, submit their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Tisbury Towing & Transportation Co., Inc., f/k/a Packer Marine, Inc., to review the judgment of the United States Court of Appeals for the First Circuit. For the reasons set forth herein, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

For the purposes of this Brief in Opposition, Respondent adopts and incorporates by reference the relevant facts set forth in the reported opinion rendered by the United States Court of Appeals for the First Circuit, decided June 5, 2001, in *Tisbury Towing & Transportation Co. v. Tug VENUS and Tucker-Roy Marine Towing & Salvage, Inc.*, 251 F.3d 298 (1st Cir. 2001). The decision is reprinted in Appendix A to the Petition for Writ of Certiorari, Pet. App. A at 1a-8a. Respondents also rely upon the factual findings contained in the unpublished decision of the district court that is reproduced in Appendix B to the Petition, Pet. App. B at 9a-20a.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. This Case Does Not Meet the Criteria For Review By This Court.

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. Although not exhaustive, Rule 10 lists a number of considerations governing the grant of a petition for writ of certiorari. Specifically, the Court may decide to undertake review if:

(a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; or

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that

> conflicts with relevant decisions of this Court.

Id. None of the above is present in the instant case.

Firstly, further review of this matter is not justified under Rule 10(a) because the First Circuit decision is not in conflict with the Second Circuit's opinion in *Sternberg Dredging Co. v. Moran Towing & Transportation Co., Inc.*, 196 F.2d 1002, *reh'g denied per curiam*, 200 F.2d 603 (2d Cir. 1952). When the district court concluded that Petitioner had not satisfied its burden of proving that the stipulated grounding of the Tug VENUS had taken place on June 15, 1994, an essential fact upon which Petitioner conceded its theory of causation depended, Petitioner shifted its approach. As discussed in more detail below, Petitioner's reliance on *Sternberg* to foist the burden of producing evidence onto Respondents as to the date of the tug's grounding is a misapplication of that holding to the facts where, as here, Petitioner failed to introduce sufficient, credible evidence below to establish the elements of a *prima facie* case, to wit: the time, place, and cause of the damage to the ALGOL 500. Pet. App. B at 19a-20a. Without these predicate facts, the *Sternberg* decision has no application whatsoever to the distinguishable set of facts presented below. See Pet. App. A at 7a.

Secondly, review of the First Circuit's decision is not warranted under Rule 10(b) because Petitioner does not seek review of a state court opinion.

Thirdly, and more to the point, the decision below does not deviate from or otherwise conflict with this Court's long-standing decision in *Stevens v. The White City*, 285 U.S. 195 (1932), so as to compel review under

Rule 10(c). As outlined below, the district court correctly applied the elements of *Stevens* by requiring Petitioner to establish the necessary elements of a *prima facie* case. Pet. App. B at 15a. (*citations omitted*).

Finally, the fact that the Petition does not present a novel legal issue or an aberration of settled law militates against further review. The First Circuit's decision does not break any new ground; instead it applies the established framework enunciated by this Court in *Stevens* to the facts of the present case.

For these reasons, there are no compelling considerations that warrant review by this Court.

B. The First Circuit's Decision is Consistent with Supreme Court Jurisprudence and Decisions of Other United States Court of Appeals.

Recognizing *Stevens* as the seminal case concerning a tug's duty to its tow, both the district court and First Circuit properly rejected Petitioner's claim that Respondents should bear the burden of production as to when the grounding incident occurred. 251 F.3d at 300-01, Pet. App. A at 7a; Appendix B at 15a. In denying Petitioner's appeal, the First Circuit addressed this issue squarely:

> Packer does not point us to, and we have been unable to locate, *any* case standing for the proposition that a defendant's failure to report an accident has any effect on the allocation of burdens. Packer does cite to *Sternberg Dredging Co. v. Moran Towing & Transp. Co.*, 196 F.2d 1002 (2d Cir. 1952) (L. Hand, J.), for the proposition that: "It is often a controlling factor in deciding

> where to throw the burden of producing evidence . . . that the proper party to charge is he who alone could discover the truth." *Id.* at 1006. But taken in isolation that proposition is clearly an overstatement. *See Stevens v. The White City*, 285 U.S. 195, 202-03 (1932) (holding that, as to allocation of burdens, it is not "material that the facts of the case, and the causes of the collision, are peculiarly within the knowledge of the respondents. . . . We are not aware [ ] of any ground on which such an inconvenience can affect the rule of law which governs the rights of the parties." (internal quotation marks omitted)).

251 F.3d at 300-01, Pet. App. A at 6a-7a. (*emphasis added*). Thus, since 1932, this Court has held clearly and unequivocally that a bailment does not arise from a towage contract, *Stevens*, 285 U.S. at 200, and that the owner of a tow has the burden of proving that the negligence of the tug caused injury to the tow. *Id.*

Petitioner's half-hearted attempt to introduce elements of unfairness and prejudice into these proceedings is disingenuous. Pet. at 12, fn. 3. The undisputed evidence below is that Petitioner received information that the VENUS might have run aground with one of its barges from a third-party towing company in August of 1994, not more than two months after the stipulated grounding. App. A at 1-3. Petitioner also received similar information from at least two other sources. App. A at 3-7. Notwithstanding the possibility that one of its barges might have grounded, Petitioner did not question Respondent owner or any member of the VENUS' crew about the purported incident. App. A at 7-8. Nor did

Petitioner cause an inspection of its own fleet to determine whether any of its barges had been damaged. App. A at 8.

While Respondents were admittedly in the best position to document this incident, Petitioner was not too far behind. By its own inaction, Petitioner's effort to now claim prejudice as a result of Respondents' failure to report the tug's grounding must fail.[1]

C. The Underlying Issues and Facts of this Matter are Narrowly Confined and are Not Likely to Have Continuing Future Consequences.

In its conclusion, Petitioner argues that the First Circuit's ruling will discourage the reporting of marine casualties, albeit statutorily required, all to the detriment of maritime commerce and safety. Pet. at 19. Petitioner greatly exaggerates the significance of the First Circuit's decision which in no way alters or changes prospectively the statutory reporting requirements as they now appear at 46 C.F.R. §-4.05-1. In reality, the case below presented ordinary issues of negligence in the context of a towage relationship. In the end, it was a case of causation, pure and simple, with little impact on admiralty jurisprudence.

---

[1] Respondent owner's failure to comply with the reporting requirements of 46 C.F.R. § 4.05-1 (1988) is irrelevant to the Petition because the regulation did not require Respondent owner or the Coast Guard to notify Petitioner of the casualty once reported. The cases cited by Petitioner are inapposite. Pet. at 3.

After considering the relevant facts and the applicable law, the First Circuit properly held that Petitioner did not cite to any controlling authority to buttress its proposition that Respondent's failure to report the tug's grounding should shift the burden of production as to when the incident occurred. This case raises no other significant issue of admiralty law that warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

NORMAN A. PELOQUIN, II
Counsel of Record

LAW OFFICE OF
NORMAN A. PELOQUIN, II
Morad Building, 460 County Street
New Bedford, MA 02740-5107
Tel. (508) 991-2300

Attorney for Respondents
Tug Venus and Tucker-Roy Marine Towing & Salvage, Inc.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PACKER MARINE, INC.,	*	
Plaintiff	*	
vs.	*	CIVIL ACTION
	*	No. 97-11392-RGS
TUG VENUS, *in rem*, and	*	
TUCKER-ROY MARINE TOWING & SALVAGE, INC., *in personam*	*	
Defendants	*	

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
BENCH TRIAL, DAY 1
May 10, 1999

* * *

[33] Q Now, had you heard anything prior to your conversation with Mr. Roy about a grounding on Middle Ledge?

A Yes, I had.

Q What had you heard?

A We do a great deal of work with Olmsted Marine in Woods Hole. It has a launch service, light towing service.

Kit Olmsted calls us from time to time, discusses the world, and he –

Q What do you mean he discusses the world?

A Pardon.

Q What do you mean that he discusses the world?

A Well, everything that happens in Woods Hole and thereabouts, and in conversation he said, I heard that Conrad Roy was on Middle Ledge with the barge.

And I said, Well, I don't know anything about it, or this or that.

And I said, If he had been on Middle Ledge with one of our barges, he would have told us.

[34] And that really kind of ended the conversation with Kit Olmsted. We went on to other things that we were supposed to be doing and didn't concentrate on everything that happens in Woods Hole.

Q Now, did you – how did Mr. Olmsted end the discussion on this incident?

A He said, "You didn't hear is [sic] from me."

Q What did you understand him to mean by that?

A Well, it's a – there's a lot of words that pass by and a lot of stories and a lot of events, and I think he was trying to be helpful, but then he realized that maybe he wasn't helpful and ended the conversation.

Q So did you rely on this information or that conversation that was provided to you by Mr. Olmsted?

A No, I didn't accept it as a true observation, and it was third or forth [sic] party and –

Q What do you mean it was "third or forth [sic] party"?

A Well, he heard it – as he told me, he heard it from somebody else who heard it from somebody where the weather was very foggy that spring, it was – it was part of the conversation that happens around the waterfront.

Q What kind of – can you describe what you – what kind of words would you use to describe that kind of conversation?

A Well, I do know Kit very well, but it is a little extra [35] conversation that does occur.

Q Well, is it reliable conversation or not reliable?

A No. He heard it from somebody and who did that person hear it from, and we hear a lot of things.

Q Now, what about the time of this conversation, do you recall when it was that it was made?

A It was in August.

Q Of what year?

A 1994.

* * *

[65] Q When I use the term, scuttlebutt, Mr. Packer, do you have a definition or understanding of that term?

A It's something to stay away from.

Q But you will agree there is a lot of scuttlebutt on the waterfront?

A There is a lot of scuttlebutt on all waterfronts.

Q And isn't it true that you had several conversations with several people between the summer of 1994 and June of 1997 when you filed the complaint regarding this incident?

[66] A I had – yes.

Q Can you detail briefly the conversations you had and identify the people you spoke with?

A I had conversations with Don Lynch of Sea Tow.

Q Where does Mr. Lynch reside?

A At Cuttyhunk Island.

And Charles Mitchell, I had a conversation with him.

Q And Mr. Mitchell operates the tug JAGUAR?

A Yes.

Q Is he the same person that you had previously used to tow your barges?

A Yes.

Q Any other conversations?

A With other people?

Q Yes, sir.

A Probably spoken with Jeff Linberg at various times on business, and then other activity in New Bedford.

Q My question is more pointed.

Who did you speak to during that time frame from the summer of '94 to the summer of '97 when your

attorney filed the complaint, and I'm specifically talking about Mr. Roy and the tug VENUS running aground on Middle Ledge?

A Kit Olmsted would be the third one.

Q What did Mr. Lynch tell you, if anything, about the [67] alleged incident?

A He said he heard something on the radio. He wasn't quite sure. We asked him a couple of times what it was, but it was just the waterfront news.

Q Waterfront gossip?

A Good term.

Q When did this conversation – when did the first conversation with Mr. Lynch take place?

A I'm not exactly sure.

Q Was it before or after the March 1995 inspection of the 500?

A It might have been before.

Q Now, can you tell us the substance of your conversations with Mr. Mitchell regarding the incident?

A He did let us know, or did say during the period of time that the VENUS was hauled at Fairhaven Shipyard for bottom damage that it had received.

Q Mr. Mitchell keeps his tugboat at the same marina as Mr. Roy?

A Yes.

Q And it happens to be Fairhaven Shipyard?

A Yes.

Q When did your first conversation with Mr. Mitchell take place regarding this incident?

A Sometime during the summer of 1994.

[68] Q And lastly, we have Mr. Olmsted, Kit Olmsted. Is it "K-I-T" or "K-I-T-T"?

A It's Christopher.

Q It's Christopher Olmsted, and his nickname is Kit, I guess?

A Yes.

Q What did Mr. Olmsted tell you?

A It was in August of '94.

Q Could it have been earlier?

A It could have been earlier. Could have been.

Q But you recall it was sometime in the summer of '94?

A Yes.

Q What did Mr. Olmsted tell you?

A Just the same thing I just said a few minutes ago.

There was – there was some points of information of what he had heard on the waterfront.

Q And Mr. Olmsted's a good friend of yours, isn't he?

A We worked together for a number of years.

Q And yet, what, if anything, did you do as a result of Mr. Olmsted's conversation with you that there was a possibility that one of your barges went aground with the VENUS?

A I said to him that I believe that Conrad Roy would have called me if he had a problem with the barge. I would be – it would be the responsibility on the towing vessel.

[69] Q Did you call Mr. Roy as a result of your conversation with Mr. Olmsted?

A No, I did not.

Q Did you see Mr. Roy from time to time at your facility in Vineyard Haven during the course of the next year?

A I'm not sure. I'm not sure I did or not. He might have come to the terminal over with a barge and departed, and I might have said, Hello.

Q Your office is within the terminal?

A Yes, it is.

Q Did you ever go aboard the VENUS and talk to Mr. Roy about the possibility that one of your barges went aground?

A No, I did not.

Q Did you ever ask to view the tug logbook?

A No, I did not.

Q Did you ever ask to speak to any of the crew on board the VENUS?

A No, I did not.

Q Did you ever hire a diver to inspect the bottom of the 500 as a result of your conversation with Mr. Olmsted?

A No, I did not.

Q It's fair to say that you did nothing, isn't it, sir, from the time you spoke with Mr. Olmsted until March of '95 when the Coast Guard inspected the barge?

A We did not make any inspections on the bottom during [70] that period.

* * *

[128] INDEX

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
RALPH PACKER				
By Mr. Farrell	6		99	
By Mr. Peloqun		51		110

* * *

[129] CERTIFICATE

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/ James P. Gibbons
James P. Gibbons, CSR, RPR-RMR
Official Court Reporter
7205 United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210
(617) 428-0402

Supreme Court, U.S.
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No. 01-0319

In the Supreme Court of the United States

TISBURY TOWING & TRANSPORTATION CO., INC.,
f/k/a PACKER MARINE, INC.,
Petitioner,

v.

TUG VENUS and TUCKER-ROY
MARINE TOWING & SALVAGE, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

DAVID J. FARRELL, JR.
Counsel of Record
CONNORS & FARRELL
ROUTES 28 & 137
S. CHATHAM, MA 02659
(508) 432-2121

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

REPLY BRIEF

Respondent now argues that to "document" a marine casualty, an unmanned, dumb barge owner has a duty to act on third- or fourth-hand "scuttlebutt" which he deemed unreliable and even his declarant retracted. Brief in Opposition at 5-6; Respondent's App. at 2-3. There are five problems with Respondent's argument.

First, assuming Petitioner had acted on such multiple hearsay, investigating and hiring a diver to inspect the bottoms of its fleet in August 1994 as suggested by Respondent, Brief in Opposition at 5-6; Respondent's App. at 7-8, that still would not have provided any documentation of the VENUS grounding *date* or *barge involved.* Respondent would have simply accelerated its "agnosticism" due to the lack of VENUS log entries and accident reports required by Coast Guard regulations. See Petition for Writ of Certiorari at 7.

Second, Respondent's discussion of trial testimony is incomplete. Regarding Mr. Olmstead, he immediately retracted his third- or fourth-hand hearsay in August 1994. Respondent's App. at 2-3. Respondent then misstates that "Petitioner also received similar information from at least two other sources." Brief in Opposition at 5. But regarding Mr. Lynch, the date of unspecified "[w]aterfront gossip" he overheard on the radio is unsure, but "might have been before" March 1995. Respondent's App. at 5. And regarding Mr. Mitchell, re-direct clarified it was not until 1997 that Petitioner received information about a grounding from him. Petitioner's Reply App. E at 30a.

Third, Respondent contends that 46 C.F.R. § 4.05.1 (1988) is irrelevant because it does "not require Respondent

owner or the Coast Guard to notify Petitioner of the casualty once reported." Brief in Opposition at 6 n.1. Respondent misses the point. Had Respondent complied with 46 C.F.R. § 4.05.1, the Coast Guard would have documented the date of the grounding and the name of the barge involved and would have routinely insisted that Respondent fill out a Form CG-2692 and Form CG-2692A (Barge Addendum) within five days, as required by 46 C.F.R. § 4.05-10(a)(1987). A Coast Guard inspection of the barge involved would then have followed (as shown by the cases cited in the Petition for Writ of Certiorari at 3, which are not inapposite) and this case would have been resolved years ago.

Fourth, it is curious that Respondent states "Petitioner shifted its approach" after the district court's ruling, Brief in Opposition at 3, since Respondent's burden of producing evidence in view of its failure to report the grounding to the Coast Guard was central to (Plaintiff's Proposed) Findings and Conclusions, A. 278-79.

Fifth, as a matter of maritime policy, Respondent now contends that the remedy for omitted VENUS log entries and required Coast Guard accident reports is initiative based on multiple, retracted hearsay. Not only does the First Circuit opinion condone maritime concealment in violation of regulations, but now Respondent contends that expectations of regulatory violation and bad faith should be the commercial standard, which is the logical next step.

CONCLUSION

In sum, Respondent's argument that despite its reporting violations Petitioner suffered no prejudice due to waterfront scuttlebutt is contrary to fact, law, and policy. Stevens v. The White City, 285 U.S. 195 (1932), does not

control here because threshold facts "peculiarly within the knowledge of the respondents" were withheld in violation of Coast Guard reporting regulations. Because it is dangerous for maritime commerce to condone those violations, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

David J. Farrell, Jr.
CONNORS & FARRELL
Routes 28 and 137
P.O. Box 186
S. Chatham, MA 02659
508.432.2121
Counsel for Petitioner

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 97-11392-RGS

PACKER MARINE, INC.

v.

TUG VENUS, in rem, and
TUCKER-ROY MARINE
TOWING & SALVAGE, INC.,
in personam

CIVIL ACTION

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
BENCH TRIAL, DAY 1
May 10, 1999

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[106] Q. Now, let me – finally, let me ask you, you mentioned on your cross-examination by Mr. Peloquin that Charlie [107] Mitchell told you about grounding damage on

the VENUS, I believe your testimony was, sometime during the summer of 1994.

Is that really – is that really your recollection?

A. If we went backwards, so to speak, at one time he called and said – he gave – he gave us a person that we might want to contact, and that is when he talked to – and reconstruct that and contact that person.

Q. Now, what was the information that he provided to you during that conversation?

A. He said that he knew the skipper of the VENUS on the night of June 15.

Q. What other information did he provide to you at that time?

MR. PELOQUIN: Your Honor, I'm going to object and put on the record that there is a stipulation between parties regarding the testimony of Mr. Mitchell. It was done sometime ago in correspondence, and plaintiff's counsel has told me that Mr. Mitchell had no personal knowledge of the incident, and I consider the identity of the skipper to be personal knowledge.

THE COURT: Overruled.

Q. What did Mr. Mitchell tell you –

MR. FARRELL: I'm sorry?

[108]**THE COURT:** Overruled.

Q. What did Mr. Mitchell – when did Mr. Mitchell mention to you there was grounding damage, that he understood, on the VENUS?

A. I think that we go back to when he said there was a person that was on the VENUS, and that was, maybe, three or four months before you actually had an opportunity to speak to that person.

Q. Okay.

So was this – now, was this after I was involved in the case or was it before?

A. I would say it was after.

Q. The person that you're talking about who you understood perhaps to be the skipper was who?

A. A gentleman named Mr. Correia.

Q. So do you recall when my office became involved in the case?

A. I'm not exactly sure.

Q. If I were to represent to you that it was in the spring of 1997, would you disagree with that?

A. No, that would be – you were engaged at that time.

Q. And can you describe some of the frustrations that you've understood from me that we had in investigating this case regarding, say, the date of the haul out, do you remember?

[109] A. The date?

Q. The date of the VENUS haul out at Fairhaven Shipyard. Do you recall some of the problems that we had?

A. You were never able to acquire that information until you must have made a visit to Fairhaven Shipyard and they did tell you the date, which was, I believe, June 20.

Q. And what about Dave Correia, do you remember some of the problems that our office specifically had in contacting him?

A. It took almost three months for you to make an appointment with him to see him in Providence, as I remember.

MR. FARRELL: Nothing further, your Honor....

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